No. 90-272

SEP 24

JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

TYRONE BROOKS, LANETT STANLEY, BILLY McKINNEY, JOE BEASLEY, VENUS E. HOLMES, MICHAEL ROBINSON, EDWARD BROWN, REV. DR. WILLIAM HOWELL, JOHN WHITE, MARY YOUNG-CUMMINGS, MARY BLACK, WILLIE MAYS, WILLIAM YOUNG, DEANIE FRAZIER, DIANE HARVEY-JOHNSON, REV. G.L. AVERY, JUANITA T. WILLIAMS, PATRICIA C. JONES, EDITH INGRAM GRANT, HENRY COOK, ANNIE SMITH, AND ERCEL BALDWIN,

Appellants,

versus

GEORGIA STATE BOARD OF ELECTIONS and MAX CLELAND, Secretary of State and Chairman of the Georgia State Board of Elections,

Appellees.

On Appeal From The United States District Court For The Southern District Of Georgia

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

KATHLEEN L. WILDE
Counsel of Record
LAUGHLIN McDONALD
NEIL BRADLEY
American Civil Liberties
Union Foundation, Inc.
44 Forsyth St NW – Suite 202
Atlanta GA 30303
404/523-2721

Counsel for Appellants

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

ARGUMENT

I. There is No Foundation in Law Or Fact for An Order Permitting Unprecleared Judges to Remain In Office After a Section 5 Objection on the Merits 2

II. Plaintiffs Have Consistently Sought An Order Declaring The Unprecleared Judgeships To Be Null and Void, In Accordance With Section 5 Jurisprudence 2

III. Vindication Of Section 5 Benefits All Protected Persons, Including the Instant Plaintiffs 6

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES:

Allen v. State Board of Elections, 393 U.S. 544 (1969) 3, 7

Hathorn v. Lovorn, 457 U.S. 255 (1982) 2

NAACP v. Hampton County Election Comm'n, 470 U.S. 166 (1985) 5

Perkins v. Matthews, 400 U.S. 379 (1971) 3, 5, 7

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 7

OTHER AUTHORITIES:

Section 5 of the Voting Rights Act, 42 U.S.C. §1973c ..... *passim*

S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982) 5

No. 90-272

In The

Supreme Court of the United States

October Term, 1990

TYRONE BROOKS, LANETT STANLEY, BILLY McKINNEY, JOE BEASLEY, VENUS E. HOLMES, MICHAEL ROBINSON, EDWARD BROWN, REV. DR. WILLIAM HOWELL, JOHN WHITE, MARY YOUNG-CUMMINGS, MARY BLACK, WILLIE MAYS, WILLIAM YOUNG, DEANIE FRAZIER, DIANE HARVEY-JOHNSON, REV. G.L. AVERY, JUANITA T. WILLIAMS, PATRICIA C. JONES, EDITH INGRAM GRANT, HENRY COOK, ANNIE SMITH, AND ERCEL BALDWIN,

Appellants,

versus

GEORGIA STATE BOARD OF ELECTIONS and MAX CLELAND, Secretary of State and Chairman of the Georgia State Board of Elections,

Appellees.

On Appeal From The United States District Court For The Southern District Of Georgia

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

ARGUMENT

I. THERE IS NO FOUNDATION IN FACT OR LAW FOR AN ORDER PERMITTING UNPRECLEARED JUDGES TO REMAIN IN OFFICE AFTER A SECTION 5 OBJECTION ON THE MERITS

Defendants' Motion to Dismiss or Affirm is grounded not in law, but in purported "equitable considerations" spun out of whole cloth. There is no foundation in the record for Defendants' assertions that the method of electing superior court judges does not discriminate against black citizens (Motion, 6-8), nor that an order voiding the unprecleared judgeships "would be of no benefit to minority voters" (Motion, 11). Further, there is no basis in law for the State's claim that its need for additional judges overrides the preclearance requirements of Section 5 (Motion, 20-21). Finally, whatever discretion the district court possessed to consider "equitable factors" in shaping a remedy, that discretion ended with the Attorney General's objection on the merits. Having sought and been denied preclearance, the State cannot rely on the "hardships" created by its own violation of law to avoid the affirmative relief mandated by this Court.

II. PLAINTIFFS HAVE CONSISTENTLY SOUGHT AN ORDER DECLARING THE UNPRECLEARED JUDGESHIPS TO BE NULL AND VOID, IN ACCORDANCE WITH SECTION 5 JURISPRUDENCE

Plaintiffs have consistently argued that the appropriate remedy for the State's violation of Section 5 is to declare the unprecleared judgeships null and void, in accordance with established law. *Hathorn v. Lovorn*, 457

U.S. 255, 270 (1982); *Perkins v. Matthews*, 400 U.S. 379, 397 (1971); *Allen v. State Board of Elections*, 393 U.S. 544, 572 (1969).

At the time they first filed their Motion for Preliminary Injunction under Section 5, Plaintiffs requested that the court:

> (b) enjoin any further implementation of the statutes . . . until and unless preclearance is obtained from the United States Attorney General;
>
> (c) void all appointments made and elections held for these unprecleared judicial circuits and posts;[1]
>
> (d) in the alternative, require Defendants to complete their submission under Section 5 within thirty (30) days from the date of this motion . . .

Plaintiffs' Motion for Preliminary Injunction, p. 4 (April 4, 1989). Plaintiffs have never waivered from that position.

On December 1, 1989, the three-judge court, in the exercise of its discretion, entered an order affording defendants thirty days within which to complete their Section 5 submission. 36a-37a. In the event defendants failed to do so, the court provided that the unprecleared judgeships would become null and void at the conclusion of the incumbent's term of office. The court also enjoined

---

[1] The statutes at issue create the new elected position and its numbered election post, as well as specifying the date of election and method of interim selection. Until the statutes are precleared, they cannot lawfully be implemented, and the judgeships do not legally exist. It is for that reason that the positions themselves, and not just the methods by which they are elected, are null and void.

any futher appointments to unprecleared positions, including any vacancies which might occur in those implemented but unprecleared seats. 41a.

Defendants immediately sought reconsideration of that remedial order, challenging the court's authority to provide "for the elimination of judgeships." *Brief in Support of Defendants' Motion, In the Alternative, for Rehearing, Reconsideration, Clarification, Or Relief from the December 1, 1989 Order of the Court, Or To Alter and Amend That Order,* p. 2 (December 14, 1989). Plaintiffs argued in reply, "[t]his Court's remedial order is fully consistent with, and required by, Section 5 jurisprudence." *Plaintiffs' Brief in Opposition to Defendants' Motion for Rehearing or Reconsideration,* p. 1.[2]

On April 25, 1990, the Attorney General entered an objection *on the merits* to the establishment of a total of 58 superior court judgeships. On May 29, 1990, the three-judge court granted Defendants' Motion for Reconsideration, dramatically altering its previous order as to remedy. The court vacated those portions of its order that

---

[2] It is this language which Defendants contend constitutes an abandonment of Plaintiffs' right to contest the court's final order. That is simply untrue. Plaintiffs were merely supporting the three-judge court's authority to declare unprecleared positions vacant and void. They neither addressed nor condoned that aspect of the order that permitted judges to remain in office until the end of their terms.

More fundamentally, however, the December 1, 1989 order was entered before the objection on the merits by the Attorney General. Once Defendants have been afforded the opportunity to obtain preclearance, and it has been *denied*, immediate affirmative relief is required. See discussion at J.S. 27-32.

declared unprecleared judgeships void at the conclusion of the incumbent's term. It ordered instead that those positions could continue to exist indefinitely, until and unless preclearance was refused by the United States District Court for the District of Columbia. Should the State lose its declaratory judgment action, incumbents could nonetheless remain in office for 150 days. 89a. In addition to protecting incumbents, the court modified its order to permit the State to continue to affirmatively implement the statutes that were the subject of the objection. Under the order, the State may fill any vacancies which might occur in the unprecleared positions. 89a-90a.

It is that final order which Plaintiffs challenge. Whatever discretion the court may have possessed before defendants completed their Section 5 submission, that discretion ended with the entry on April 25, 1990 of an objection on the merits. *Perkins v. Matthews*, 400 U.S. 379, 397 (1971); *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 182-83 (1985). The court was required to declare the unprecleared election changes null and void, and the judicial positions vacant, as of the date of that objection.

However convenient Defendants may find it to ignore the Attorney General's substantive objection,[3] that

---

[3] The Attorney General's determination, far from carrying "little" or "no weight" (Motion, 15), is legally binding until and unless the District Court for the District of Columbia preclears the changes. S. Rep. No. 97-417, 97th Cong., 2d Sess. 13 (1982). Congress enacted administrative preclearance to provide jurisdictions with a more expeditious route for preclearance than litigation. The Defendants' characterization of

(Continued on following page)

objection changed the rules on relief. Having been afforded time to obtain administrative preclearance[4] and having failed, the State is not entitled to any further extensions.

III. VINDICATION OF SECTION 5 BENEFITS ALL PROTECTED PERSONS, INCLUDING THE INSTANT PLAINTIFFS

Defendants assert that the relief sought by Plaintiffs and required by law would "not provide any benefit to the plaintiffs," and would instead result in harm to "all citizens of the State of Georgia, both black and white . . . " (Motion, 12). Neither is true, as a matter of fact or law.

Congress, in enacting and extending the Voting Rights Act, conclusively determined that the preclearance requirements of Section 5 are necessary to protect equal voting rights for *all* citizens. In reviewing (and upholding) the stringent preclearance provisions of Section 5,

---

(Continued from previous page)

the administrative process as an "after-thought," to be used only in "simple, noncontroversial cases," is refuted both by the legislative history and by the fact that the State itself chose to seek administrative preclearance of these changes, rather than filing an action in the District of Columbia.

[4] Defendants have also had sufficient time to change the objectionable features of these new judgeships, and have declined to do so. The General Assembly convened in Special Session in 1989, and in General Session in January 1990. Although bills were introduced to alter the method of judicial election, no action was taken, other than to enact additional judgeships under the same challenged system.

this Court examined the legislative history, and found that

> Congress sought to achieve this goal [of preventing the institution of laws with a discriminatory purpose or effect] by relying upon the voluntary submission by affected States and subdivisions of all changes in such laws before enforcing them. Failure of the affected governments to comply with the statutory requirement would nullify the entire scheme since the Department of Justice does not have the resources to police effectively all the States and subdivisions covered by the Act . . .

Perkins v. Matthews, supra, 400 U.S. at 396-97, citing *Allen v. State Board of Elections,* 393 U.S. 544, 556 (1969). Permitting unprecleared judges to remain in office seriously erodes the *pre*clearance requirements of Section 5 and places the burden of voting rights enforcement squarely on the shoulders of minority citizens, in violation of the clear Congressional intent to relieve them of that burden. *South Carolina v. Katzenbach,* 383 U.S. 301 (1966). Conversely, declaring the unprecleared positions vacant and void confirms that the requirements of Section 5 remain in full force and effect and must be obeyed.

Further, contrary to Defendants' assertion, the district court's remedial order, which permits incumbents to remain in office indefinitely, affirmatively injures Georgia's black citizens. Far from "guarantee[ing] against even the most remote possibility of voting discrimination" (Motion, 12), such an order indefinitely extends the terms of judges elected under a sytem deemed by the United States Attorney General to be intentionally discriminatory against black voters. For those judges to

remain in office *beyond* their elected term compounds the discriminatory effect,[5] and precludes black voters from having *any* voice in who holds that elected office.

Finally, the only reason the State is in a position to urge that enforcement of Section 5 would work a "tremendous disruption" and harm Georgia's citizens is because it has openly violated the Voting Rights Act, implementing some 48 judgeships without preclearance.[6] Whatever hardship may result to the State is its own doing.[7] To hold that a State may improve its remedial position by violating established law would make a mockery of the preclearance requirements themselves, and would encourage and reward intransigence.

---

[5] For example, the Stone Mountain Judicial Circuit, which consists of DeKalb County, has eight superior court judgeships, four of which were created between 1965 and 1988. In 1980, the circuit was 28% black, and is now projected to be over 30% black. However, each of the eight judges, elected county-wide, is white.

[6] The State clearly knew judicial elections were covered under Section 5. In 1968, the State submitted a change in the state constitution, providing that superior court judges would be elected by the electorate of the circuit, instead of statewide. More recently, in 1983, the State sought and obtained preclearance of the change from partisan to non-partisan elections for superior court judges.

[7] Further, as Plaintiffs pointed out in their Application for Injunction Pending Appeal, any resulting hardship could be avoided by requiring the three-judge court to design an interim election plan which would cure the features found objectionable by the Attorney General. See A-14, 19-20.

CONCLUSION

The remedial aspects of the district court's orders must be reversed and the case remanded for the entry of an appropriate and effective remedy.

Respectfully submitted,

KATHLEEN L. WILDE
Counsel of Record
LAUGHLIN MCDONALD
NEIL BRADLEY
American Civil Liberties
Union Foundation, Inc.
44 Forsyth St NW – Suite 202
Atlanta GA 30303
(404) 523-2721

Counsel for Appellants